Meeriam Rosaline a/p Edward Paul & Ors v William Singam a/l Raja Singam (suing as Public Officer of Pertubuhan Persaudaraan Kristian Thaveethin Kudaram, Ipoh, Perak)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-02–1111 OF 2007
JAMES FOONG, ABDUL MALIK ISHAK AND ABU SAMAH JJCA
12 JANUARY 2010

Civil Procedure — Striking out — Writ and statement of claim — Principles applicable — Whether claim scandalous, frivolous or vexatious — Whether claim obviously unsustainable — Rules of the High Court 1980 O 18 r 19(1)(b)

Civil Procedure — Striking out — Writ and statement of claim — Serious allegations pertaining to breach of trust, conspiracy, fraud and misrepresentation — Allegations requiring minute examination of relevant documents — Whether summary striking out procedure appropriate — Whether court ought to resolve conflicts of evidence on affidavit evidence — Rules of the High Court 1980 O 18 r 19(1)(b)

The respondent in the instant action was the public officer of a society ('the society'). The first appellant and one Menon were the two trustees ('the trustees') of the society in respect of a piece of land with a building thereon ('the property'). The trustees obtained an order for the sale of the property to the third appellant and subsequently sold, transferred and registered the property in the third appellant's name. The respondent claimed that the sale was made without the agreement, consent and/or approval of the members of the society. The respondent thus filed an action in the High Court for various declarations and reliefs against Menon and the appellants. In his statement of claim, the respondent pleaded, inter alia, that the first appellant, the second appellant and Menon had conspired with the third appellant to sell and transfer the property to the third appellant and to obtain the consent of the High Court for the sale of the property; that the appellants and Menon had jointly or severally committed breach of trust, conspiracy, fraud and misrepresentation. The first, second and third appellants applied to strike out the respondent's writ and statement of claim under O 18 r 19(1)(b) of the Rules of the High Court 1980 ('RHC'). The parties filed and exchanged eight affidavits containing allegations of breach of trust, conspiracy, fraud and misrepresentation pertaining to the transfer of the property. The High Court dismissed their application and they thus appealed to the Court of Appeal.

Held, dismissing the appeal with costs:

(1) (per **Abdul Malik Ishak JCA**) To appreciate all the allegations made, a

minute examination of all the documents together with the relevant terms of the sale and purchase agreement ought to be undertaken. For that reason, the summary striking out procedure under O 18 r 19 of the RHC could not be invoked. The instant case was a complex case and points of law requiring serious argument had been raised. It was therefore not appropriate to strike out the action without a trial (see para 6); *MJC City Development Sdn Bhd v Everise Departmental Store Sdn Bhd* [1999] 5 MLJ 42 referred; *Oh Thevesa v Sia Hok Chai* [1992] 1 MLJ 215 referred; *Pacific Internet Ltd v Catcha.com Pte Ltd* [2000] 3 SLR 26 referred.

(2) (per **Abdul Malik Ishak JCA**) It would not be appropriate for a High Court judge to resolve conflicts of evidence on affidavit in striking out proceedings when an issue of credibility is involved. The proper time to do so would be at discovery or cross-examination at the trial proper (see para 8); *Noor Jahan bte Abdul Wahab v Md Yusoff bin Amanshah & Anor* [1994] 1 MLJ 156 referred.

(3) (per **Abdul Malik Ishak JCA**) In the instant case, the respondent had set out the relevant facts showing the appellants' misconduct in order to obtain the appropriate relief. His allegations could not be said to be scandalous. The respondent's claim could not also be said to be frivolous or vexatious. The appellants had not shown on the affidavits that the respondent's statement of claim was scandalous, frivolous or vexatious (see paras 19 & 21).

(4) (per **Abu Samah JCA**) This was not a plain and obvious case to strike out the respondent's action summarily under O 18 r 19(1)(b) of the RHC as being scandalous, frivolous or vexatious. The case was not an obviously unsustainable case. The respondent's allegations pertaining to breach of trust, conspiracy, fraud and misrepresentation were matters of fact which could only be decided at the trial and not by a contest of affidavits. The mere fact that the pleading is weak and not likely to succeed at trial is no ground for the pleading to be struck out (see para 42); *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 followed; *Moore v Lawson* (1915) 3 TLR 418 referred, *Wenlock v Moloney & Ors* [1965] 2 All ER 871 referred.

[Bahasa Malaysia summary

Responden dalam kes ini merupakan seorang pegawai awam bagi sebuah pertubuhan ('pertubuhan tersebut'). Perayu pertama dan Menon adalah pemegang-pemegang amanah ('pemegang-pemegang amanah tersebut') bagi pertubuhan tersebut berkaitan dengan sebidang tanah dan sebuah bangunan di atasnya ('harta tersebut'). Pemegang-pemegang amanah tersebut telah mendapat satu perintah untuk penjualan harta tersebut kepada perayu ketiga

dan kemudiannya telah menjual, memindahmilik dan mendaftar harta tersebut atas nama perayu ketiga. Responden berhujah bahawa penjualan tersebut telah dilakukan tanpa persetujuan, izin dan/atau kelulusan ahli-ahli pertubuhan tersebut. Responden lantaran itu telah memfailkan satu tindakan di Mahkamah Tinggi untuk beberapa perisytiharan dan relief-relief terhadap Menon dan perayu-perayu. Dalam penyataan tuntutannya, responden memplid, antara lain, bahawa perayu pertama, perayu kedua dan Menon telah berkomplot bersama perayu ketiga untuk menjual dan memindahmilik harta tersebut; bahawa perayu-perayu dan Menon telah, secara bersesama dan berasingan, melakukan pecah amanah, komplot, fraud dan salah nyata. Perayu-perayu pertama, kedua dan ketiga telah memohon untuk membatalkan writ dan penyataan tuntutan responden di bawah A 18 k 19(1)(b) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Pihak-pihak tersebut telah memfail dan saling bertukar lapan afidavit yang mengandungi dakwaan-dakwaan pecah amanah, komplot, fraud dan salah nyata berhubung dengan pindahmilik harta tersebut. Mahkamah Tinggi telah mengetepikan permohonan mereka dan oleh itu, mereka telah membuat rayuan di Mahkamah Rayuan.

Diputuskan, menolak rayuan dengan kos:

(1) (oleh **Abdul Malik Ishak JCA**) Untuk menghayati kesemua dakwaan yang dibuat, satu pemeriksaan terperinci terhadap kesemua dokumen-dokumen berserta syarat-syarat perjanjian jual beli yang relevan hendaklah diambil. Atas sebab itu, prosedur pembatalan secara terus di bawah A 18 k 19 KMT tidak boleh digunapakai. Kes ini adalah kes yang rumit dan persoalan-persoalan undang-undang yang memerlukan perhujahan serius telah dibangkitkan. Oleh itu, adalah tidak sesuai untuk membatalkan tindakan tersebut tanpa satu perbicaraan (lihat perenggan 6); *MJC City Development Sdn Bhd v Everise Departmental Store Sdn Bhd* [1999] 5 MLJ 42 dirujuk; *Oh Thevesa v Sia Hok Chai* [1992] 1 MLJ 215 dirujuk; *Pacific Internet Ltd v Catcha.com Pte Ltd* [2000] 3 SLR 26 dirujuk.

(2) (oleh **Abdul Malik Ishak JCA**) Adalah tidak sesuai bagi seorang hakim Mahkamah Tinggi untuk menyelesaikan konflik-konflik keterangan bagi afidavit dalam prosiding-prosiding pembatalan apabila melibatkan satu isu kebolehpercayaan. Masa yang wajar untuk melakukannya adalah ketika penemuan atau pemeriksaan balas semasa perbicaraan sebenar (lihat perenggan 8); *Noor Jahan bte Abdul Wahab v Md Yusoff bin Amanshah & Anor* [1994] 1 MLJ 156 dirujuk.

(3) (oleh **Abdul Malik Ishak JCA**) Dalam kes ini, responden telah menyatakan fakta-fakta relevan yang menunjukkan salah laku perayu-perayu dalam perintah untuk mendapatkan relief yang bersesuaian. Dakwaan-dakwaannya tidak boleh dikatakan bersifat

skandal. Tuntutan responden juga tidak boleh dikatakan sebagai remeh atau menyusahkan. Perayu-perayu tidak menunjukkan di dalam afidavit-afidavit bahawa penyataan tuntutan responden adalah bersifat skandal, remeh atau menyusahkan (lihat perenggan 19 & 21).

(4) (oleh **Samah Noordin JCA**) Ini bukanlah satu kes yang nyata dan jelas untuk membatalkan tindakan responden secara terus di bawah A 18 k 19(1)(b) KMT atas sebab ianya bersifat skandal, remeh atau menyusahkan. Kes ini bukanlah satu kes yang begitu jelas tidak dapat dikekalkan. Dakwaan-dakwaan responden berkaitan dengan pecah amanah, komplot, fraud dan salah nyata merupakan perkara-perkara fakta yang hanya boleh diputuskan semasa perbicaraan dan bukannya melalui pertikaian afidavit-afidavit. Fakta semata-mata bahawa pliding adalah lemah dan berkemungkinan tidak berjaya semasa perbicaraan bukan alasan untuk membatalkan pliding tersebut (lihat perenggan 42); *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 diikut; *Moore v Lawson* (1915) 3 TLR 418 referred, *Wenlock v Moloney & Ors* [1965] 2 All ER 871 dirujuk.]

Notes

For a case on writ and statement of claim, see *Mallal's Digest* (4th Ed, 2007 Reissue) para 6653.

Cases referred to

Active Timber Agencies Pte Ltd v Allen & Gledhill [1996] 1 SLR 478, HC (refd)

Attorney-General of The Duchy of Lancaster v London and North Western Railway Company [1892] 3 Ch 274, CA (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (folld)

Brooking v Maudslay, Son, And Field (1887–88) 4 TLR 421 (refd)

Christie v Christie (1872–73) LR 8 Ch App 499 (refd)

Cracknall v Janson (1879) 11 Ch D 1, CA (refd)

Dyson v Attorney-General [1911] 1 KB 410, CA (refd)

Goh Koon Suan v Heng Gek Kiau & Ors [1991] 2 MLJ 307, HC (refd)

Hubbuck & Sons, Limited v Wilkinson, Heywood & Clark, Limited [1899] 1 QB 86, CA (refd)

Jamir Hassan v Kang Min [1992] 2 MLJ 46, HC (refd)

Ko Teck Siang v Low Fong Mei & Anor and other actions [1992] 1 SLR 454, CA (refd)

Low Fong Mei & Anor v Ko Teck Siang & Ors and other applications [1989] 3 MLJ 140, HC (refd)

MJC City Development Sdn Bhd v Everise Departmental Store Sdn Bhd [1999] 5 MLJ 42, HC (refd)

Moore v Lawson and Another (1914–15) 31 TLR 418, CA (refd)

Noor Jahan bte Abdul Wahab v Md Yusoff bin Amanshah & Anor [1994] 1 MLJ 156, HC (refd)
Oh Thevesa v Sia Hok Chai [1992] 1 MLJ 215, HC (refd)
Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd [1984] 2 MLJ 143, HC (refd)
Pacific Internet Ltd v Catcha.com Pte Ltd [2000] 3 SLR 26, HC (refd)
Resources Mining Pte Ltd v Puteh bte Abdullah & Ors [1989] 3 MLJ 393, HC (refd)
RS Krishnan a/l RS Naidu v Eric Soon Boo Teck (Rawang Hills Resort Sdn Bhd, third party) [2004] 1 MLJ 252, HC (refd)
Saw Seng Kee v Nadzri & Ng Securities Sdn Bhd [1996] 2 MLJ 238, CA (refd)
Seng Huat Hang Sdn Bhd & Ors v Chee Seng & Co Sdn Bhd [1987] 1 MLJ 413, HC (refd)
Singapore Souvenir Industry (Pte) Ltd, Re; Dr HC Huang Dan Rakan-Rakan v The Liquidator of Singapore Souvenir Industry (Pte) Ltd [1986] 1 MLJ 14, HC (refd)
Vernazza, Re [1959] 2 All ER 200, CA (refd)
Wenlock v Moloney & Ors [1965] 2 All ER 871, CA (refd)
X (Minors) v Bedfordshire County Council, M (A Minor) and Another v Newham London Borough Council and Others, E (A Minor) v Dorset County Council, Christmas v Hampshire County Council, Keating v Bromley London Borough Council [1995] 3 WLR 152, HL (refd)

Legislation referred to

Rules of the High Court 1980 O 14A, O 18 r 19, 19(1)(b), O 92 r 4

Appeal from: Suit No 22–61 of 2004 (High Court, Ipoh)

Christie Soosay Nathan (James Devadason, Jamie Tan, and Mohamed Nizam with him) (Christie Soosay Nathan & Associates) for the appellants.
SR Sree Devi (M Manoharan & Co) for the respondent.

Abdul Malik Ishak JCA:

[1] I am in complete agreement with the judgment of my learned brother Abu Samah bin Nordin JCA and I concur that the appeal should be dismissed with costs and that the deposit should rightly go to the respondent on account of taxed costs. However, I wish to express my views about the appellants' application to strike out the respondent's writ and the statement of claim pursuant to O 18 r 19(1)(b) of the Rules of the High Court 1980 ('RHC').

[2] This was not a simple straight forward case of a striking out application. It was not conspicuously clear that the claim on the face of it was obviously unsustainable. Allegations of collusion, breach of trust, conspiracy, fraud and misrepresentation have been hurled at one another. Even the order of the High Court dated 28 July 2003 in approving the sale of the property to the third appellant who was the fourth defendant in the High Court was challenged.

[3] The facts can be distilled from the pleadings. They reflected the animosity between the parties.

[4] The respondent sued the appellants as well as Menon in the respondent's capacity as a public officer of the society. The respondent alleged that there was collusion and/or conspiracy among the appellants together with Menon in effecting the final transfer of the property to the third appellant who was the fourth defendant in the High Court. Against the first and the third appellants together with Menon, the respondent alleged that they have colluded and conspired in obtaining the court order approving the sale of the property to the third appellant who was the fourth defendant in the High Court. Further allegations of fraud were levelled against the first appellant and Menon in obtaining the said court order and on top of that there was also an allegation of breach of trust on the part of the first and the third appellants together with Menon. As I said, the respondent even challenged the order of the High Court dated 28 July 2003 in approving the sale of the property to the third appellant who was the fourth defendant in the High Court. The respondent alleged that the consent of the members of the society for the sale of the property was obtained after the sale and purchase agreement was signed. The respondent also challenged the validity of the consent which was obtained through an extra ordinary general meeting held after the signing of the sale and purchase agreement. Several reliefs sought by the respondent have been set out by my learned brother Abu Samah bin Nordin JCA and I need not regurgitate them here.

[5] The appellants filed their respective defences. Menon too filed his defence. The first and the second appellants denied the allegations and the claims of the respondent and instead they countered that there was conspiracy between the respondent and Menon who was the second defendant in the High Court relating to the property transaction. The third appellant who was the fourth defendant in the High Court took the position that they were the bona fide purchaser of the property and they filed a counterclaim for the possession of the property as well as for damages and costs. Menon, on the other hand, who was the second defendant in the High Court admitted the claims of the respondent and he alleged that the first, second and the third appellants had colluded with a solicitor's firm in

effecting the final transfer of the property to the third appellant who was the fourth defendant in the High Court. Menon further alleged that there were irregularities in the court order approving the sale of the property to the third appellant who was the fourth defendant in the High Court. According to Menon, the said court order was obtained through collusion and misrepresentation by the first, second and the third appellants.

[6] To appreciate all these allegations, a minute examination of all the documents together with the relevant terms of the sale and purchase agreement ought to be undertaken. And it is for this reason, that the striking out under the summary procedure under O 18 r 19 of the RHC cannot be invoked (*MJC City Development Sdn Bhd v Everise Departmental Store Sdn Bhd* [1999] 5 MLJ 42). It is quite obvious that points of law requiring serious argument has been raised and it is not appropriate to strike it out without a trial (*Oh Thevesa v Sia Hok Chai* [1992] 1 MLJ 215). A complex case, like the present appeal, cannot and should not be summarily struck out (*Pacific Internet Ltd v Catcha.com Pte Ltd* [2000] 3 SLR 26).

[7] In applying to strike out the respondent's claim under O 18 r 19 of the RHC, not less than eight conflicting affidavits were filed by the parties before the High Court. I have read all these affidavits and I must categorically say that they contain a bag-full of issues and facts relating to the allegations of fraud, collusion and misrepresentation in relation to the transfer of the property to the third appellant who was the fourth defendant before the High Court. The affidavits also revealed that there are issues of fraudulent misrepresentation by the trustees of the society as well as the bona fides of the transaction between the third appellant who was the fourth defendant in the High Court and the trustees of the society.

[8] In my judgment, it is not fair for a judge of the High Court to resolve conflicts of evidence on affidavit in a striking out proceeding when an issue of credibility is involved. This is actually the scenario which the learned judge of the High Court had to reckon with. The appropriate time to do so would be by way of a discovery or by way of a cross-examination at the trial proper (*Noor Jahan bte Abdul Wahab v Md Yusoff bin Amanshah & Anor* [1994] 1 MLJ 156).

[9] The power to strike out is derived from the rules and the inherent jurisdiction of the court as envisaged in O 92 r 4 of the RHC. Edgar Joseph Jr J (later SCJ) in *Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd* [1984] 2 MLJ 143 at p 147 aptly said that:

> ... the inherent jurisdiction of the court includes all the powers that are necessary 'to fulfil itself as a Court of law'; 'to uphold, to protect, and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner'.

[10] The scope of O 92 r 4 of the RHC is very wide and it is not capable of being defined in a precise manner. At the end of the day, the duty of the court is to 'make an order as may be necessary to prevent injustice or to prevent an abuse of the process of the court' (*Re Singapore Souvenir Industry (Pte) Ltd; Dr HC Huang Dan Rakan-Rakan v The Liquidator of Singapore Souvenir Industry (Pte) Ltd* [1986] 1 MLJ 14; *Low Fong Mei & Anor v Ko Teck Siang & Ors and other applications* [1989] 3 MLJ 140 (HC); *Ko Teck Siang v Low Fong Mei & Anor and other actions* [1992] 1 SLR 454 (CA); and *Jamir Hassan v Kang Min* [1992] 2 MLJ 46).

[11] It is germane, at this juncture, to refer to the observations of Lindley LJ in *Attorney-General of The Duchy of Lancaster v London and North Western Railway Company* [1892] 3 Ch 274 (CA). There, at pp 276–277, His Lordship had this to say:

> Then the Vice-Chancellor says: 'The questions raised upon this application are of such importance and such difficulty that I cannot say that this pleading discloses no reasonable cause of action, or that there is anything frivolous or vexatious; therefore, I should let the parties plead in the usual way.' It appears to me that this is perfectly right. To what extent is the court to go on inquiring into difficult questions of fact or law in the exercise of the power which is given it under O xxv r 4? It appears to me that the object of the rule is to stop cases which ought not to be launched — cases which are obviously frivolous or vexatious, or obviously unsustainable; and if it will take a long time, as is suggested, to satisfy the court by historical research or otherwise that the County Palatine has no jurisdiction, I am clearly of opinion that such a motion as this ought not to be made. There may be an application in chambers to get rid of vexatious actions; but to apply the rule to a case like this appears to me to misapply it altogether.

[12] In *Saw Seng Kee v Nadzri & Ng Securities Sdn Bhd* [1996] 2 MLJ 238 at p 249, Mahadev Shankar JCA writing for the Court of Appeal said:

> Order 18 r 19(1)(b), (c) and (d) of the Rules of the High Court 1980 have no application if the disputed facts once established at the trial will support a cause of action. The importance of first establishing the facts before attempting short cuts has been the subject of cases under O 33. The reasoning applies equally to applications under O 18 and 19. The following statements should help in establishing the correct approach:
>
> (a) If this issue were determined as a preliminary issue, the preliminary point might go to the House of Lords. They might say 'You must get the facts before we decide the law'. Rather than put the parties to all that expense (and, I may add, delay), I think that we should have the facts ascertained in the trial court before the difficult and important point of law is decided: per Lord Denning MR in *Richards v Naum* [1966] 3 All ER 812 at p 815.
>
> (b) My Lords, in common with all Your Lordships, I agree that this should be treated as the question to be answered. But I hope that Your Lordships'

agreement so to treat it will not encourage others to invoke the preliminary point procedure in unsuitable cases, or lead those whose task it is to decide whether or not the trial of preliminary points should be ordered to be other than extremely cautious before acceding to pleas for the making of such orders as a result of attractively advanced submissions founded on pleas of supposed economy: per Lord Roskill in *Allen v Gulf Oil Refining Ltd* [1981] 1 All ER 353 at p 364.

(c) The learned judge took what has turned out to be an unfortunate course. Instead of finding the facts, which should have presented no difficulty and taken little time, he allowed a preliminary point of law to be taken, whether case 10 applies to a case where there are joint owners one only of which requires the house as a residence. So the case has reached this House on hypothetical facts, the correctness of which remain to be tried. I, with others of Your Lordships, have often protested against the practice of allowing preliminary points to be taken, since this course frequently adds to the difficulties of courts of appeal and tends to increase the cost and time of legal proceedings. If this practice cannot be confined to cases where the facts are complicated and the legal issue short and easily decided, cases outside this guiding principle should at least be exceptional: per Lord Wilberforce in the case of *Tilling v Whiteman* [1980] AC 1 at pp 17–18.

[13] In short, the parties are not entitled to take unjustifiable '*short-cuts*' under O 18 r 19 of the RHC.

[14] The court will not readily accede to an application to strike out unless it is a clear cut case (*Oh Thevesa v Sia Hok Chai*; *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; *Resources Mining Pte Ltd v Puteh bte Abdullah & Ors* [1989] 3 MLJ 393; *Hubbuck & Sons, Limited v Wilkinson, Heywood & Clark, Limited* [1899] 1 QB 86 (CA) at p 91; *Attorney-General of The Duchy of Lancaster v. London and North Western Railway Company*; *Dyson v Attorney-General* [1911] 1 KB 410 (CA) at p 419; and *Noor Jahan bte Abdul Wahab v Md Yusoff bin Amanshah & Anor*). According to Lord Browne-Wilkinson in *X (Minors) v Bedfordshire County Council, M (A Minor) and Another v Newham London Borough Council and Others, E (A Minor) v Dorset County Council, Christmas v Hampshire County Council, Keating v Bromley London Borough Council* [1995] 3 WLR 152 (HL) at p 174:

> Actions can only be struck out under the RSC O 18 r 19 where it is clear and obvious that in law the claim cannot succeed. Where the law is not settled but is in a state of development (as in the present cases) it is normally inappropriate to decide novel questions on hypothetical facts.

[15] Continuing at p 175, His Lordship Lord Browne-Wilkinson had this to say:

> I again agree with Sir Thomas Bingham MR that if, on the facts alleged in the statement of claim, it is not possible to give a certain answer whether in law the claim is maintainable then it is not appropriate to strike out the claim at a preliminary stage but the matter must go to trial when the relevant facts will be discovered.

[16] *Moore v Lawson and Another* (1914–15) 31 TLR 418 (CA) is an authority for the proposition that if a case is not strong and unlikely to succeed it is not a basis to strike out the claim.

[17] Thean J, in *Low Fong Mei & Anor v Ko Teck Siang & Ors and other applications* [1989] 3 MLJ 140 said that the duty of the judge in hearing an application to strike out is not to usurp the role of the trial judge by producing (see p 149) 'a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way'.

[18] Here, the appellants' application to strike out hinged on the ground that it was scandalous, frivolous or vexatious. According to Lord Selborne LC in *Christie v Christie* (1872–73) LR 8 Ch App 499, at p 503:

> The sole question in such a case is whether the matter alleged to be scandalous has a tendency, or, in other words, would be admissible in evidence to shew the truth of any allegation in the bill that is material with reference to the relief that is prayed.

[19] The plaintiff in *Brooking v Maudslay, Son, And Field* (1887–88) 4 TLR 421 made allegations in the statement of claim of dishonest conduct against the defendant, but the plaintiff stated in his reply that he sought no relief on that ground. The allegations became immaterial and were accordingly struck out as scandalous and embarrassing. Here, the respondent meant what he said in his statement of claim and his allegations cannot be termed as scandalous and it must proceed to trial. Here, the respondent set out the relevant facts showing the appellants' misconduct in order to obtain the appropriate relief (*Cracknall v Janson* (1879) 11 Ch D 1 (CA)). In my judgment, the facts highlighted by the respondent were the necessary facts and they were not intended to abuse and, consequently, they must be held not to be scandalous.

[20] The case of *Attorney-General of The Duchy of Lancaster v London and North Western Railway Company* defined the phrase 'frivolous or vexatious' to mean cases that can be categorised as 'obviously unsustainable' or 'wrong'. I am entitled to look at the whole history of the case (*Active Timber Agencies Pte Ltd v Allen & Gledhill* [1996] 1 SLR 478 at p 487; *Goh Koon Suan v Heng Gek Kiau & Ors* [1991] 2 MLJ 307; and *Re Vernazza* [1959] 2 All ER 200)

A and, after having done that, I am of the considered view that the respondent's claim cannot be said to be frivolous or vexatious.

[21] It was for the appellants to show on affidavits that the respondent's statement of claim was scandalous, frivolous or vexatious (*RS Krishnan a/l RS Naidu v Eric Soon Boo Teck (Rawang Hills Resort Sdn Bhd, third party)* [2004] 1 MLJ 252). Nothing of that sort came to light.

Abu Samah JCA (delivering judgment of the court):

[22] This was an appeal by the appellants against the decision of the learned judge of the Kuala Lumpur High Court dismissing their application (encl 10) to strike out the respondent's writ of summons and statement of claim under O 18 r 19(1)(b) of the Rules of the High Court 1980 ('RHC') as being scandalous, frivolous or vexatious.

[23] The respondent was a public officer of Persatuan Persaudaraan Kristian Thaveethin Kudaram, Ipoh, Perak ('the society'). The first appellant was one of the two trustees of the society in respect of land held under HS (D) Ka 744/76 No 71560 Mukim Ulu Kinta, Kinta Perak, measuring approximately 52153 square feet with a building thereon known as Renong Sports Complex and having its address at No 27, Jalan Ng Weng Hup, Taman Pertama, 30100 Ipoh Perak ('the property'). She was also at the material times the deputy president of the society. The other trustee was one Menon Manasa a/l AJ George ('Menon'). He was the president of the society and named as the second defendant in the court below but he was not a party to this appeal. The second appellant was the secretary of the society. The third appellant (fourth defendant in the court below) was the company which subsequently bought the property from the trustees of the society. It was at the material times, the registered owner of the said property, which is now the subject matter of the dispute between the parties herein.

[24] The society had earlier pursuant to an agreement dated 16 July 1999 bought the said property from Kinta Properties Sdn Bhd for RM2,300,000. The trustees signed the agreement on behalf of the society. It was funded by way of a friendly loan of RM2,100,000 from one Tan Sri Narayanan a/l Govindasamy by using a company known as Taipan Consolidated Projects Sdn Bhd ('the company') as a vehicle.

[25] It was agreed between the trustees and the financier that the friendly loan would be repaid once the society managed to obtain a loan from a commercial bank. Unfortunately it was unable to raise the loan from any

commercial bank. On 1 November 2000 the company through its solicitors demanded repayment of the friendly loan.

[26] The society had no money to pay the friendly loan. As a way out, on 28 May 2003 the first appellant and Menon, acting as trustees of the society entered into a conditional agreement with Millennium Yield Sdn Bhd, the third appellant to sell the property to the latter for a sum of RM2,099,950 ('the purchase price'). Under the terms of the conditional sale and purchase agreement ('SPA') it was agreed that the purchase price would be paid directly to the company as full and final settlement of the friendly loan.

[27] Clause 1A.1 of the SPA states that the sale is conditional upon the first appellant and Menon, as trustees of the society, obtaining an order of the High Court for the said sale.

[28] On 28 July 2003 the High Court approved the trustees' application for the sale of the said property. The property was then duly transferred and registered in name of the third appellant.

[29] The respondent later came to know of the sale transaction. He claimed that the sale was made without the agreement, consent and/or approval of the committee members of the society and/or the majority of members of the society.

[30] On 5 April 2004 he filed this action ie Civil Suit No 22–61 of 2004 at the Kuala Lumpur High Court claiming no less than 20 reliefs including, among others, the followings:

(a) a declaration that the order of the High Court dated 28 July 2003 was null and void;

(b) an injunction against the purchaser, its agent or servants in dealing with the said property;

(c) the registration of the purchaser as registered owner of the property be revoked by the registrar of titles;

(d) the property be retransferred and registered in the name of the first appellant and Menon, as trustees of the property for the society;

(e) a declaration that the first appellant and Menon acted in breach of the trust deed dated 12 October 1999;

(f) a declaration that the purchaser had acquired the property by way of conspiracy, fraud and misrepresentation;

(g) general damages against the appellants and Menon for conspiracy, fraud and misrepresentation;

(h) aggravated damages against all of them; and

(i) interests and costs.

[31] In his statement of claim the respondent pleaded, inter alia, that the first appellant, the second appellant and Menon had conspired with the third appellant to sell and transfer the property to the latter and to obtain the consent of the High Court for the sale of the property; that the appellants and Menon had, jointly or severally committed breach of trust, conspiracy, fraud and misrepresentation. The particulars of the alleged breach of trust, conspiracy fraud and misrepresentation were pleaded in the statement of claim. It was also pleaded that the second appellant and Menon, had by deceit forged a notice dated 30 May 2005 calling for the emergency general meeting of the society which purportedly approved the sale of the property.

[32] The appellants in their joint statement of defence alleged that the respondent was not duly appointed as the public officer of the society and/or that his purported appointment was obtained by fraud and/or deceit; that the respondent was not even a member of the society and that this action was an abuse of the process of the court as the respondent had conspired with Menon, who was his brother in law and having de facto control of the society to defraud the appellants so that Menon could remain in the premises unlawfully and to continue his unlawful activities.

[33] The first appellant and Menon claimed that they entered into the SPA with the third appellant in order to pay off the friendly loan given to the society.

[34] The third appellant claimed that it bought the property as a bone fide purchaser for value. The third appellant also filed a counterclaim and prayed for immediate possession of the property and damages and costs against the respondent.

[35] It was against the above background and facts that on 10 July 2004 the first, second and third appellants filed an application (encl 10) to strike out the respondent's writ and statement of claim under O 18 r 19(1)(b) of the RHC.

[36] Menon, however did not join the three appellants in their application to strike out the respondent's suit. This was not surprising as he appeared to have admitted all the allegations in the respondent's statement of claim.

[37] No less than eight affidavits have been filed and exchanged between the parties. They contained allegations of breach of trust, conspiracy, fraud and misrepresentation pertaining to the transfer of the property. The appellants however denied these allegations.

[38] Now, in view of the serious allegations of breach of trust, conspiracy, fraud and misrepresentation in the respondent's statement of claim, the denials by the appellants in their joint statement of defence and the conflicting affidavits by the opposing parties can it be said that this is a plain and obvious case for striking out of the respondent's action?

[39] The learned judge dismissed the appellant's application. He was of the view that this was not a plain and obvious case to strike out the respondent's action summarily as being scandalous, frivolous or vexatious. It was not an obviously unsustainable case: see *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; *Re Vernazza* [1959] 2 All ER 200, *Seng Huat Hang Sdn Bhd & Ors v Chee Seng & Co Sdn Bhd* [1987] 1 MLJ 413.

[40] Being dissatisfied, the appellants appealed to this court.

[41] The principles of law in respect of application to strike out a party's pleading under O 18 r 19(1) of the RHC are well settled. There is a plethora of authorities on this. I need only cite one case, which had often been relied upon in an application to strike out a party's pleading. Mohamed Dzaiddin SCJ, in delivering the judgement of the Supreme Court, in *Bandar Builder Sdn Bhd & Ors* at p 43 said:

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v Wilkinsion*, *Heywood & Clark Ltd*), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see *AG of Duchy of Lancaster v L & NW Rly Co*). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see *Wenlock v Moloney & Ors*). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in pari material with our O 33 r 2 of the RHC) (see *Hubbuck & Sons Ltd v Wilkinson*, *Heywood & Clark Ltd*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[42] The above said passage, in our view, provides a complete answer to this appeal. In short, we were of the view that this was not a plain and obvious case to strike out the respondent's action summarily under O 18 r 19(1)(b) of the RHC as being scandalous, frivolous or vexatious. It was obviously not an unsustainable case, pure and simple. The respondent's allegations pertaining to breach of trust, conspiracy, fraud and misrepresentation were matters of facts which could only be decided at the trial and not by contest of affidavits. The mere fact that the pleading is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out (see *Moore v Lawson and Another* (1914–1915) 31 TLR 418, *Wenlock v Moloney & Ors* [1965] 2 All ER 871.

[43] In the premises, we dismissed the appeal with costs and ordered that the deposit be paid to the respondent on account of taxed costs.

POSTSCRIPT

[44] Initially, there were two appeals before us, namely the instant appeal and Appeal No A 02–1110 of 2007. The other appeal was against the decision of the learned judge dismissing the third appellant's application (encl 32) under O 14A of the RHC. The third appellant withdrew its appeal after we dismissed the first appeal. We were informed by learned counsel for the appellants that the society had been deregistered on 27 January 2006. Accordingly we struck off the other appeal and made no order to costs. The deposit was refunded to the appellant.

[45] My learned brothers James Foong JCA and Abdul Malik bin Hj Ishak JCA have seen this judgment in draft and associate themselves with it.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon